

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

RICHLAND/WILKIN JOINT POWERS
AUTHORITY,

Civil No. 13-2262 (JRT/LIB)

Plaintiff,

and

MINNESOTA DEPARTMENT OF
NATURAL RESOURCES

Intervenor-Plaintiff,

ORDER

v.

UNITED STATES ARMY CORPS OF
ENGINEERS, ROBERT SPEER,
ASSISTANT SECRETARY OF THE
ARMY FOR CIVIL WORKS, and COL.
SAM CALKINS,

Defendants,

and

FARGO-MOORHEAD FLOOD
DIVERSION BOARD OF AUTHORITY
and CITY OF OXBOW,

Intervenor-Defendants.

Gerald W. Von Korff and Jonathan Wolf, **RINKE NOONAN**, P.O. Box 1497, Saint Cloud, MN 56302, for plaintiff.

Colin Patrick O'Donovan and Max H. Kieley, Assistant Attorneys General, **MINNESOTA ATTORNEY GENERAL'S OFFICE**, 445 Minnesota Street, Suite 900, Saint Paul, MN 55101, for intervenor-plaintiff.

Devon Lehman McCune, **UNITED STATES DEPARTMENT OF JUSTICE**, 999 18th Street, South Terrace, Suite 370, Denver, CO 80202, for defendants.

Robert E. Cattnach and Michael R. Drysdale, **DORSEY & WHITNEY LLP**, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, for intervenor-defendant Fargo-Moorhead Flood Diversion Board of Authority.

Joseph A Turman, **TURMAN & LANG, LTD**, PO Box 110, Fargo, ND 58107, for intervenor-defendant City of Oxbow.

The Army Corps of Engineers (the “Corps”) and the Fargo-Moorhead Flood Diversion Authority (the “Diversion Authority”) are engaged in a compressive construction effort aimed at lessening the flooding problems caused by the Red River of the North. On September 7, 2017, the Court enjoined further work on a construction plan, now referred to as “Plan A,” because the Corps and the Diversion Authority had not received necessary permits from the Minnesota Department of Natural Resources (“DNR”).

In recognition of the Court’s injunction, and in an effort to establish a project that would best serve the interests of all affected parties, North Dakota governor Doug Burgum and then Minnesota governor Mark Dayton created the Fargo-Moorhead Area Flood Diversion Task Force. The Task Force, Army Corps, and Diversion Authority eventually compromised on a new flood protection plan, referred to as “Plan B.” On December 27, 2018, the DNR granted the Corps and Diversion Authority a Dam Safety and Public Waters Work Permit (the “Permit”) for this new plan. The Court commends the hard work and leadership shown by both Governors Burgum and Dayton, as well as the Task Force, in reaching this Plan B compromise.

In response to the DNR's permit decision, the Richland/Wilkin Joint Powers Authority ("JPA") filed a request for a contested case hearing with the DNR, seeking the Permit's rescission. This request has not yet been granted, but a decision is expected in the immediate future. There is disagreement between the parties as to whether, if a contested case hearing is granted, the Permit would be effective or if the Permit would be voided pending the results of the contested case hearing.

On January 23, 2018, the Court held a status conference with all the parties to discuss these updates and to determine how to proceed with the present litigation. The Diversion Authority and the Corps requested that the Court hold that the prior injunction does not extend to Plan B, which would potentially allow the Diversion Authority and the Corps to begin construction immediately. The JPA argued that any such request should be done by motion.

Because of the present uncertainty regarding the Plan B permit approval process, the need for additional permits as indicated in the conditions imposed by the DNR, the interim effects any contested hearing may have on the Plan B permit, and the federal appropriations lapse affecting the Corps and the United States Department of Justice—which is representing the Corps—the Court orders that any Plan B construction must not commence until further order of the Court. The purpose of this order is simply to preserve the status quo until further information and clarification is available.

When the federal appropriations lapse ends and the Department of Justice is able to resume work on this case, the Court will invite any motions to either extend the injunction to Plan B or to lift the injunction entirely. Further, at that time, if necessary,

the Court will address any arguments regarding whether construction on certain parts of Plan B may commence despite any contested case hearing.

Based on the foregoing, **IT IS HEREBY ORDERED** that the Fargo-Moorhead Flood Diversion Authority and the Army Corps of Engineers not commence construction on Plan B until further Order of the Court. This Order shall not affect construction projects that the Court has approved under the current injunction.

DATED: January 25, 2019
at Minneapolis, Minnesota.

s/John R. Tunheim
JOHN R. TUNHEIM
Chief Judge
United States District Court